Supreme Court, U.S.
FILED

931250 JAN 31 1994

OFFICE OF THE CLERK

No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE CITY OF DALLAS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

GENICE A.G. RABE
Counsel of Record
L.N.D. WELLS, JR.
Suite 1202
600 E. Las Colinas Boulevard
Irving, Texas 75039-5606
(214) 556-2999
Counsel for Petitioners

January 31, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

148 PP

QUESTIONS PRESENTED

1. Official City of Dallas policy denied promotions and caused demotions of visually impaired and insulin dependent diabetic Plaintiffs and class members in alleged driving positions. The district court found that under the Rehabilitation Act these impairments were handicaps, that Plaintiffs were otherwise qualified, and that the City must determine on an individual basis whether class members were otherwise qualified. The court of appeals reversed and rendered finding that Plaintiffs and class members were neither handicapped nor, as a matter of law, otherwise qualified and that class injunctive relief was improper.

A. Are visual deficiencies and insulin dependent diabetes handicaps both as handicaps per se and where the employer regards them as handicaps.

B. Should determinations of whether a handicapped person is otherwise qualified be made on an individual basis, not a categorical holding that, as a matter of law, he is a safety risk.

C. Was class injunctive relief requiring that the City make individual determinations of whether handicapped employees were otherwise qualified proper.

D. Did the court of appeals violate the clearly erroneous rule by reversing the district court's unchallenged factual findings including that Plaintiffs were handicapped and otherwise qualified.

2. Whether due process requires that a person deprived of a property interest in his job through demotion be allowed to present evidence of the reasons he alleges caused his demotion including the employer's discrimination against him.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below include those named in the caption of this petition. In addition, the district court certified two subclasses represented by Plaintiffs: All City of Dallas employees who have diabetes mellitus requiring insulin for control and who have visual impairments.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	6
A. Course of Proceedings and Disposition	6
B. Statement of Facts	9
1. Administrative Directive 3-3	9
2. The Plaintiffs Lyle Chandler and Adolphus Maddox	10
3. The Class	13
REASONS FOR GRANTING THE WRIT	13
I. THE QUESTIONS PRESENTED ARE IMPORTANT	14
II. THE COURT OF APPEALS' DECISION CONFLICTS WITH SUPREME COURT AND OTHER COURTS OF APPEALS' PRECEDENT	17
A. Handicapped Status	17
B. Otherwise Qualified	21
C. Class Certification	25
D. Due Process	26

TABLE OF CONTENTS—Continued

Page

III. IT IS NECESSARY THAT THIS COURT EXERCISE ITS SUPERVISORY POWERS 27

CONCLUSION 29

LIST OF APPENDICES

Appendix A

Court of Appeals Opinion filed September 20, 1993, 2 F.3d 1385 (5th Cir. 1993) 1a

Appendix B

District Court Findings of Fact and Conclusions of Law filed September 10, 1992 ..... 22a

Appendix C

District Court Order Reinstating Judgment filed September 10, 1992 ..... 69a

Appendix D

District Court Judgment filed April 29, 1991 ..... 70a

Appendix E

Court of Appeals Opinion filed April 9, 1992, 958 F.2d 85 (5th Cir. 1992) 75a

Appendix F

District Court Order Denying Stay of Judgment filed September 10, 1992 ..... 86a

Appendix G

Court of Appeals Order Granting Stay of Injunctive Relief Pending Judgment filed July 16, 1993.... 88a

TABLE OF CONTENTS—Continued

Appendix H — Page

District Court Memorandum Opinion and Order filed November 4, 1986 ..... 89a

Appendix I

District Court Order of Class Certification filed April 26, 1989 ..... 96a

Appendix J

Court of Appeals Denial of Petition for Rehearing and Suggestion for Rehearing En Banc filed November 2, 1993, 9 F.3d 105 (5th Cir. 1993) 98a

Appendix K

Excerpts from Federal Regulations Concerning the Rehabilitation Act 100a

Appendix L

EEOC Regulations Concerning the Americans with Disabilities Act 103a

Appendix M

Federal Motor Carrier Safety Regulations 105a

Appendix N

Issues of the City of Dallas on Appeal 108a

TABLE OF AUTHORITIES

CASES Page

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 27
Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993) 19
Bentievegna v. Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) 19, 23
Brown v. County of Genesee, 37 F.E.P. 1595 (D.C. Mich. 1985) 19
Chalk v. U.S. Dist. Court, Cent. Dist. of California, 840 F.2d 701 (9th Cir. 1988) 23
Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992) 2, 7, 28
Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), reh'g den'd, 9 F.3d 105 (1993) ..... *passim*
Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) 19, 23
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 27
Colorado Civil Rights Comm'n v. North Wash. Fire Prot. Div., 772 P.2d 70 (Colo. 1988) 19
Commonwealth Dep't of Transp. v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989), *All. den'd*, 575 A.2d 570 (Pa. 1990) 19
Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Oppor., 405 A.2d 618 (Conn. 1978) 19
Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 15
Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993) 23
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 27
Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) 19
Dep't of Labor v. Texas Instruments, 80 OFC-28, 47 F.E.P. 18 (June 7, 1988) 23
E.E. Black Ltd. v. Marshall, 497 F. Supp. 484 (D.C. Haw. 1980) 23
Frito-Lay v. Wisconsin Labor & Ind. Rev. Comm'n, 290 N.W.2d 551, (Wis. Ct. App. 1980), *aff'd*, 303 N.W.2d 668 (Wis. 1980) 19

TABLE OF AUTHORITIES—Continued

	Page
Greenwood v. State Police Training Ctr., 606 A.2d 336 (N.J. 1992)	19
Jackson v. Maine, 544 A.2d 291 (Me. 1988), *cert. den'd*, 491 U.S. 904 (1989)	19
Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985)	24
Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990)	23
Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)	23
Miller v. Sioux Gateway Fire Dep't, 497 N.W.2d 838 (Iowa, 1993)	19
Norris v. St. Joseph Hospital, 1993 U.S. App. LEXIS 11991 (4th Cir. 1993)	19
O.F.C.C.P. v. Norfolk & Western R.R. Co., Case No. 90-OFC-1 (June 26, 1991)	19
Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981)	17, 19
Pullman-Standard v. Swint, 456 U.S. 73 (1982)	27
School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)	*passim*
Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2nd Cir. 1989)	19
Stratie v. Dep't of Transp., 716 F.2d 227 (3rd Cir. 1983)	23
Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1985)	27
Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985)	24
Wood v. Omaha School Dist., 985 F.2d 437 (8th Cir. 1993)	19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I	5, 6, 13, 28
U.S. Const. amend. XIV, § 1	5, 6, 13, 28

STATUTES, REGULATIONS AND RULES

28 U.S.C. § 1254	2
28 U.S.C. § 1331	6

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 1343 6
28 U.S.C. § 2201 6
28 U.S.C. § 2202 6
29 U.S.C. § 701 *et seq.* (Rehabilitation Act) ..... *passim*
42 U.S.C. § 1983 6
42 U.S.C. § 1988 6
42 U.S.C. § 12101 *et seq.* (Americans with Disabilities Act) ..... *passim*
28 C.F.R. § 42 (1993) 4, 20
29 C.F.R. § 32 (1993) 4, 20
29 C.F.R. § 1630 (1993) 5, 20
40 C.F.R. § 7 (1992) 4, 20
41 C.F.R. § 60-741 (1993) 4, 20
45 C.F.R. § 84 (1992) 4, 20
49 C.F.R. §§ 390 and 391 (1992) 5, 10, 24
57 Fed. Reg. 10295 (March 25, 1992) (to be codified at 49 C.F.R. § 391) 5, 10, 24
58 Fed. Reg. 40690 (July 29, 1993) (to be codified at 49 C.F.R. § 391) 5, 10, 24
City of Dallas Administrative Directive 3-3 ..... *passim*
Fed. R. Civ. Proc. 23(b)(2) 6, 8, 25
Fed. R. Civ. Proc. 52(a) 27, 28
Tex. Rev. Civ. Stat. Ann. art. 5221(k) (Texas Commission on Human Rights Act) 8, 13

LEGISLATIVE HISTORY

123 Cong. Rec. 13,515 (May 4, 1977) 14
H. Rep. No. 485(III), 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 455 ..... 15, 22
S. Rep. No. 357, 102nd Cong., 2nd Sess., *reprinted in* 1992 U.S.C.C.A.N. 3712 15
S. Rep. No. 1297, 93rd Cong. 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373 ..... 14, 18, 22

BOOKS AND PUBLICATIONS

Mark L. Bayler, *Dulling a Needle: Analyzing Federal Employment Restrictions on People with Insulin Dependent Diabetes*, 67 Ind. L.J. 1067 (1992) 23

TABLE OF AUTHORITIES—Continued

Page

Anna Phipps Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 Wm. & Mary L.R. 149 (1988) 15

Dep't of Health and Human Services, Diabetes in the United States: A Strategy for Prevention (1993) 16

Ingrid Libman et al, *How Many People in the U.S. Have IDDM?*, 16 Diabetes 841 (1993) 16

Bonnie P. Tucker, *Section 504 of the Rehabilitation Act after Ten Years of Enforcement: The Past and the Future*, 4 U. Ill. L. Rev. 845 (1989) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE CITY OF DALLAS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

We, Lyle S. Chandler, Adolphus A. Maddox, and others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing and rendering and from which Petitioners apply for writ of certiorari is reported at 2 F.3d 1385 (5th Cir. 1993) and attached in the Appendix ("App.") at 1a-21a. The court of appeals' denial of Petitioners' timely motion for panel rehearing and suggestion of rehearing *en banc* (App. 98a-99a) is reported at 9 F.3d 105 (5th Cir. 1993). The

district court's Findings of Fact and Conclusions of Law and Order Reinstating Judgment entered on September 10, 1993, which were reversed on appeal in 1993, are not reported, but are reproduced at App. 22a-68a and 69a-74a, respectively.

There were earlier judgments in this case. The first opinion of the court of appeals that vacated judgment and remanded for further findings of fact and conclusions of law is reported at 958 F.2d 85 (5th Cir. 1992) (App. 75a-85a). The previous judgment of the district court is not reported, but is reproduced at App. 70a-74a.

Finally, the district court's Memorandum Opinion and Order largely denying Defendant City's Motion for Summary Judgment entered November 4, 1986, is attached at App. 89a-95a, and the district court's April 26, 1989, Order of Class Certification is included at App. 96a-97a.

JURISDICTION

Petitioners seek review of the judgment and opinion of the Fifth Circuit Court of Appeals entered on September 20, 1993. The Petitioners' timely petition for panel rehearing and suggestion for rehearing *en banc* were denied on November 2, 1993. This Petition is timely filed. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Rehabilitation Act

The relevant portions of the Rehabilitation Act, 29 U.S.C. § 701, *et seq.* include:

§ 701 Findings; Purpose; Policy

(b) Purpose

The purposes of this chapter are—

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through—

. . .

(F) the guarantee of equal opportunity.

§ 706 Definitions

(8)(B) . . . the term "individual with a disability" means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

§ 794 Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

City of Dallas Administrative Directive 3-3

City of Dallas Administrative Directive 3-3, "Driver Safety Program," provides in relevant part:

5.2. A Primary Driver shall NOT be certified to operate a vehicle for the City of Dallas if they [sic]:

c. Do not meet the physical standard for the certification.

5.4. A person may be physically certified every two years to operate a vehicle for the City of Dallas if they [sic]:

c. Have no established medical clinical history or medical diagnosis of diabetes mellitus currently requiring insulin for control.

j. Have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

Federal Regulations

Federal Regulations applying the Rehabilitation Act include:

Non-Discrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance (Dep't of Health and Human Services), 45 C.F.R. § 84 (1992);

Obligations of Contractors and Subcontractors for Handicapped Workers (Office of Federal Contract Compliance Programs), 41 C.F.R. § 60-741 (1993);

Non-Discrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7 (1992);

Non-Discrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance (Office of the Sec. of Labor), 29 C.F.R. § 32 (1993);

Non-Discrimination; Equal Employment Opportunities; Policies and Procedures (Dep't of Justice), 28 C.F.R. § 42 (1993).

The applicable portions of such regulations are reproduced at App. 100a-102a.

Relevant sections of the Regulations of the Equal Employment Opportunity Commission (EEOC) to Implement the Equal Employment Provisions of the Americans with Disabilities Act (ADA) and EEOC's Interpretative Guidance on Title I of the ADA, 29 C.F.R. § 1630 (1993), are reproduced at App. 103a-104a.

Relevant portions of the Fed. Motor Carrier Safety Regulations (Fed. Highway Admin., Dep't of Transp.), 49 C.F.R. §§ 390 and 391 (1992), are reproduced at App. 105a-106a. The Dep't of Transp. waiver provisions for interstate drivers with insulin dependent diabetes and visual deficiencies appear at 58 Fed. Reg. 40690 (July 29, 1993) and 57 Fed. Reg. 10295 (Mar. 25, 1992) (to be codified at 49 C.F.R. § 391). Portions are again reproduced at App. 106a-107a.

Constitutional Provisions

The First Amendment to the Constitution of the United States is:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

Plaintiffs filed this case in 1985 on behalf of themselves and a proposed class of City of Dallas employees who were barred from city jobs under City of Dallas Administrative Directive 3-3 (AD3-3). AD3-3 bars from approximately four thousand (4,000) "primary driving" jobs in one hundred thirty-eight (138) different job classifications persons with a host of impairments, including diabetes mellitus requiring insulin for control and visual deficiencies. Plaintiffs claimed that the City denied them promotion, opportunity for promotion, and limited them in performance of their positions because of their physical disabilities or perceived physical disabilities.[1] They also claimed that they had been retaliated against, disciplined, and demoted because of their opposition to AD3-3. They alleged that these acts violated the Rehabilitation Act and the Texas Commission on Human Rights Act. They also alleged violation of their constitutional rights to free speech, due process, and equal protection.

The jurisdiction of the district court was invoked under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; the First and Fourtenth Amendments to the United States Constitution; 28 U.S.C. §§ 1331, 1343, 2201, 2202; and 42 U.S.C. §§ 1983 and 1988.

In March 1989 the district court held a class certification hearing and certified two subclasses: a diabetes subclass and a visual deficiency subclass. The district court held that AD3-3 defined the class and provided the basis of a Rule 23(b)(2) class for injunctive relief only.

---

[1] Effective October 29, 1992, the Rehabilitation Act was amended to incorporate the language and standards of the Americans with Disabilities Act. One change was to replace the term "handicapped" with the term "disabled." P.L. No. 102-569 (codified as amended at 29 U.S.C. § 706(8)). The terms are used interchangeably in this Petition.

The case was tried to the district court August 6 through 10, 1990. On April 29, 1991, Judgment was entered for Plaintiffs and class members.

The City appealed. The Fifth Circuit vacated the Judgment and remanded for findings of fact and conclusions of law particularly on the issues of whether Plaintiffs were handicapped and otherwise qualified under the Rehabilitation Act. The court explained that it needed detailed findings to apply the clearly erroneous standard of review. *Chandler v. City of Dallas,* 958 F.2d 85 (5th Cir. 1992).

On September 10, 1992, the district court entered fifty-two (52) pages of Findings of Fact and Conclusions of Law (Findings and Conclusions) and an Order Reinstating Judgment.[2] The district court specifically found that Plaintiffs and class members were handicapped because Administrative Directive 3-3 treats them as handicapped by denying them "primary driving" positions solely on the bases of their diabetes and visual deficiencies. It also found that they were handicapped because their diabetes and visual deficiencies impaired their major life activities including securing, retaining, and advancing in employment. It held that Plaintiffs were handicapped according to federal regulations, case law, the City's own actions and admissions, and common sense. The district court also explained that its findings were based on its determinations that the testimony of Plaintiffs and their four medical experts (two endocrinologists, a vision expert, and a psychologist) was worthy of belief and that the testimony of the City's sole medical expert and many of its supervisors and managers was not. The district court relied on the credited medical testimony, the Plaintiffs' work and driving histories, and other evidence to find that Plaintiffs were otherwise qualified. Based on its findings the district court concluded that the City had violated

---

[2] App. 22a-74a.

the Rehabilitation Act and the Texas Commission on Human Rights Act.

The district court found that Chandler was unlawfully demoted to T-7 Electrical Repairer, denied promotions to the positions of T-10 Electrical Repairer in 1985 and Water Maintenance Supervisor 13 in 1989, and due back pay exceeding $79,000.00. Similarly, the district court directed that the City had unlawfully denied Maddox promotion to T-9 Plant Mechanic in 1985 and that he was due over $27,000 in back pay.

The district court also held that the City, "the party opposing the class," had, with respect to AD3-3, "acted or refused to act on grounds generally applicable" to the two subclasses, thereby making injunctive relief appropriate to prevent the discriminatory application of AD3-3 under Fed. R. Civ. Proc. 23(b)(2). It required that the City stop discriminating against its employees on the basis of their handicaps, diabetes and visual deficiencies, without proof that each individual excluded from "primary driving" positions was a safety risk.

The district court also held that the City had denied to Plaintiffs their constitutional rights to free speech, due process and equal protection for claims distinct from their handicap discrimination claims. It found that the City had demoted and threatened Plaintiffs for their speech, violated Chandler's right to due process by denying him opportunity to present evidence during his appeal of his demotion that it was discriminatory and retaliatory, and violated the Plaintiffs' equal protection rights because there was no rational basis for the City to discriminate against them because of their handicaps. The district court awarded Chandler over $100,000.00 and Maddox over $25,000.00 in damages for these violations.

The City again appealed, although it did not claim that the district court's findings of fact were clearly erroneous.[3]

---

[3] See Issues of the City of Dallas on Appeal, App. 108a.

The court of appeals reversed and rendered on September 20, 1993. The court held that Plaintiff Adolphus Maddox who had uncorrectable vision in his left eye was not handicapped and that, as a matter of law, persons with diabetes mellitus requiring insulin for control and visual deficiencies are not otherwise qualified. The Fifth Circuit concluded that diabetes was not itself a handicap and that it need not reach a final conclusion as to whether the City treated insulin dependent diabetics as handicapped thereby making them handicapped for purposes of the Rehabilitation Act, because of its conclusion that they, as a matter of law, were not otherwise qualified. The Fifth Circuit held that class certification was improper. It summarily concluded that Plaintiffs' right to free speech, due process, and equal protection had not been violated.[4]

The court of appeals denied Plaintiffs' motion for panel rehearing and suggestion for rehearing *en banc*.

B. Statement of Facts

The facts are detailed in the district court's Findings of Fact and Conclusions of Law.[5] The findings were not challenged on appeal. We urge this Court to examine those findings. The Petitioners summarize the basic facts below.

1. ***Administrative Directive 3-3***

The City issued AD3-3 in 1978 and has amended it numerous times.[6] AD3-3 has provided that employees could not be certified for "primary driving" positions if

---

[4] The panel did not address the district court's determination that the City retaliated against Plaintiffs in violation of the Rehabilitation Act. It, however, reversed this holding by its order reversing and rendering.

[5] App. 22a-68a.

[6] The City Manager issued AD3-3 on June 5, 1978. It was amended March 15, 1981; reissued May 17, 1984; reissued January 1, 1986; and amended effective October 1, 1989.

they had certain specified health conditions including diabetes mellitus requiring insulin for control and visual deficiencies.

The physical restrictions of AD3-3 were copied from Department of Transportation (DOT) physical standards for over-the-road drivers of large vehicles. These DOT regulations have no application to city driving or to vehicles weighing 10,000 pounds or less,[7] the kind of driving and vehicles most commonly involved in city driving.[8] AD3-3 also does not include waiver provisions found in the DOT standards for insulin dependent diabetes and visual deficiencies.[9]

2. *The Plaintiffs Lyle Chandler and Adolphus Maddox*

Lyle Chandler was hospitalized and diagnosed with diabetes mellitus in 1977. He has Type I diabetes meaning that he has to use insulin to control his diabetes. The City hired Chandler in 1981 as a T-9 Electrical Repairer with knowledge of his diabetes. He drove in this position from the date of his hire until early 1985 when the City removed him from driving because of his diabetes in accord with AD3-3.

Chandler was not allowed from late 1984 to apply for promotion to any other position covered by AD3-3 including T-10 Electrical Repair Supervisor. He also unsuccessfully sought promotion to the position of Water Maintenance Supervisor 13. The position of T-7 Electrical Repairer, T-9 Electrical Repairer, T-10 Electrical Repair Supervisor, and Water Maintenance Supervisor 13 are in a line of progression as defined by the City.[10]

---

[7] 49 C.F.R. §§ 390.3(a) and 390.5, App. 105a.

[8] Plaintiff Chandler testified that he drove a delivery van approximately five (5) hours per week in his positions as T-9 and T-7 Electrical Repairer. Tr. 17, pp. 31-32.

[9] 58 Fed. Reg. 40690 (July 29, 1993); 57 Fed. Reg. 10295 (March 25, 1992).

[10] Pls.' Trial Exs. 47-48.

Within three months of filing suit Chandler was demoted to T-7 Electrical Repairer with a corresponding decrease in salary. The City also threatened him with discharge and told him not to discuss his claim of discrimination with anyone. Chandler administratively appealed his demotion, but at hearing was denied any opportunity to present evidence that his demotion was discriminatory and retaliatory.

All medical evidence at trial was that Chandler's diabetes was well controlled and that he is and was capable of safely driving in his employment. Endocrinologists Philip Raskin, M.D., a nationally recognized expert and prolific author, and Stephen Aranoff, M.D., Chandler's treating physician, testified that Chandler's diabetes is controlled, has been controlled, and that he is fully capable of driving in his employment.[11] Plaintiffs also entered as an exhibit the report of the City's previously identified medical expert to such effect.[12] Dr. Raskin and the City's physician, Mary Jane Kelly, M.D., testified that persons with diabetes are widely discriminated against in their employment.[13] During his City employment Chandler has had no traffic accident and no accident caused by insulin reactions.

In childhood Adolphus Maddox was hospitalized because of an accident that permanently affected the vision in his left eye. His left eye vision of 20/60 cannot be corrected. With both eyes Maddox's vision is 20/15.

The City hired Maddox in 1982 and with knowledge of his visual impairment allowed him to drive in his posi-

---

[11] Tr. 19, pp. 21-23, 50-51; Tr. 21, pp. 7-11, 13.

[12] Report by Dr. Mark Leshin, Pls.' Trial Ex. 139. The City had designated Dr. Leshin as its medical expert in pre-trial materials, had Dr. Leshin examine and file a written report on Plaintiff Chandler, but did not present him as a witness at trial. Indeed, the City presented no witness to testify on diabetes or Chandler's medical condition and control of his diabetes.

[13] Tr. 21, pp. 17, 24, 26; Tr. 14, pp. 17, 22-23.

tion of Plant Mechanic T-7 from 1982 through 1985. In 1985, the City removed him from driving because his vision in his left eye did not meet the requirement of AD3-3 that vision in each eye be corrected to at least 20/40.

Plaintiff Maddox has been denied promotion and opportunity to promote since 1985 to any of the City's 4,000 "primary driving" positions including the position of Plant Mechanic T-9, the next position in the line of progression for a Plant Mechanic T-7.

In response to Maddox's complaints of restriction and non-promotability, his supervisors told him that he would never be promoted and threatened termination.[14]

Maddox has never had a driving accident on the job including during his twenty year Naval career where he drove on the ice in Antarctica and drove all types of military vehicles including those carrying bombs. The district court credited the testimony of Plaintiffs' low vision expert witness, Dr. Paul Freeman, that the visual requirements of AD3-3 were not related to safe driving or lower accident rates and that Maddox's loss of visual acuity in his left eye did not pose a risk to the City or to himself. Dr. Freeman specifically testified that Maddox's visual acuity and peripheral vision are better than that necessary for safe driving.[15]

Shortly before trial AD3-3 was amended to provide possible waivers to the diabetes restriction. The waivers were to be determined by the City Safety Officer, who was not a physician. Chandler applied for and received such a waiver on January 26, 1990. No waiver is available for the vision restrictions of AD3-3. At the same time, the City reclassified the positions that Plaintiffs held, Electrical Repairer T-7 and Plant Mechanic T-7, so that

---

[14] Tr. 18, pp. 75-77.

[15] Tr. 22, pp. 17 and 22.

they were no longer "primary driving" positions. Because of such reclassification Maddox was permitted to start driving as a T-7 plant mechanic on March 9, 1990.[16]

3. *The Class*

Class members have been barred from four thousand (4,000) city jobs because of their impairments. They have also been disciplined and demoted because they do not meet the physical requirements of AD3-3. Class members Nathaniel Richardson and Homer Stephens testified and presented documentary evidence that the City demoted them after discovery that they were insulin dependent diabetics. These and all demotions are discipline according to the City.

REASONS FOR GRANTING THE WRIT

This case poses questions of extraordinary and timely importance to millions of Americans under federal legislation prohibiting discrimination against the disabled. The decision conflicts with this Court's holdings in *School Bd. of Nassau County v. Arline*, 480 U.S. 272 (1987), other court decisions, and federal regulations. Finally, the

---

[16] These changes do not moot the present controversy. If this Petition is not granted, the Plaintiffs will likely be demoted to the same positions that they held prior to suit. Chandler will actually be in a worse position as he was demoted shortly after filing suit and in retaliation for his claims according to the district court. The Plaintiffs will receive no district court awarded back pay and damages. The Plaintiffs and class members will not be allowed to apply for promotion to driving positions and may be disciplined, demoted and terminated on the basis of their handicaps according to the court of appeals' holding that their impairments disqualify them as a matter of law. In summary, Plaintiffs and class members will receive no relief and the City will be free to continue to discriminate against handicapped employees pursuant to AD3-3. And, of course, the City's violations of Plaintiffs' rights under the United States Constitution and the Texas Commission on Human Rights Act, as found by the district court, will continue.

court of appeals' violation of the clearly erroneous rule in disregarding and reversing the district court's careful and detailed findings calls for exercise of this Court's supervisory powers.

I. THE QUESTIONS PRESENTED ARE IMPORTANT.

The court of appeals has barred the protections of the Rehabilitation Act to millions of the Act's intended disabled beneficiaries.

The Rehabilitation Act was landmark legislation recognizing the millions of handicapped Americans [17] as denied employment largely because of perceptions, stereotypes, and prejudices, not individual ability.[18] In 1990 the Rehabilitation Act was practically extended to the private

---

[17] The number of disabled Americans was estimated by Congress while considering the Rehabilitation Act and its amendments to be anywhere from 22,000,000 to 50,000,000. S. Rep. No. 1297, 93rd Cong., 2nd Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400. The Americans with Disabilities Act states that 43,000,000 Americans are physically or mentally disabled. 42 U.S.C. § 12101(a)(1).

[18] In 1974 Congress observed:

> Individuals with handicaps are all too often excluded from school and educational programs, barred from employment or are underemployed because of archaic attitudes and laws . . . and are discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms.

S. Rep. No. 1297, *supra*. Similarly, Senator Hubert Humphrey observed in commenting about regulations promulgated to enforce the Rehabilitation Act that:

> Certain kinds of discrimination have become so ingrained in our society they almost *enjoy* respectability. The [HEW] regulations will mean making an extra effort to share—to share with handicapped Americans the opportunities for an education, transportation, housing, health care and jobs that other Americans take for granted.

123 Cong. Rec. 13,515 (May 4, 1977).

sector by the enactment of the Americans with Disabilities Act.[19]

The Rehabilitation Act seeks to remedy the discrimination that disabled individuals continually encounter by "empowering such individuals to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society through . . . the guarantee of equal opportunity." [20] The primary goal of the Rehabilitation Act is to increase the employment of the handicapped.[21] The purpose of the Rehabilitation Act is to substitute individual assessment of a disabled person's abilities for reliance on archaic attitudes and laws to determine whether a disabled person is qualified for employment.

The court of appeals has, in this case, narrowed the applicaton of the Rehabilitation Act in contradiction to

---

[19] Before and after the passage of the Americans with Disabilities Act Congress continually emphasized the close relationship between the Rehabilitation Act and the Americans with Disabilities Act. The Rehabilitation Act was amended in 1992 to "ensure that the precepts and values embedded in the Americans with Disabilities Act are reflected in the Rehabilitation Act of 1973." S. Rep. No. 357, 102nd Cong., 2nd Sess., *reprinted in* 1992 U.S.C.C.A.N. 3712, 3713. The Americans with Disabilities Act similarly explained that it borrowed much of its substantive framework from Section 504 of the Rehabilitation Act of 1973. H. Rep. No. 485 (III), 101st Cong., 2nd Sess., *reprinted in* 1990 U.S.C.C.A.N. 445, 455.

[20] 29 U.S.C. §§ 701(a)(5) and (b)(1)(F).

[21] Indeed, enhancing employment of the handicapped was so much the focus of the original legislation in 1973, that Congress found it necessary the next year to explain that the Act was also intended to prohibit discrimination against the handicapped in other areas. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 n.3 (1987); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 n.13 (1984). *See also*, Anna Phipps Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 Wm. & Mary L.R. 149, 152-53 (1988).

these goals. It has misapplied two frequently litigated issues under the Act, the definition of handicap and the determination of whether the handicapped individual is "otherwise qualified," to find deserving impaired persons neither handicapped nor otherwise qualified and therefore unprotected by the Act. The result is contradictory. According to the Fifth Circuit admitted physical impairments such as insulin controlled diabetes and visual deficiencies are not so severe as to be handicaps, but the same physical impairments are, as a matter of law, so severe that persons with these impairments are not otherwise qualified. This interpretation makes the Act inapplicable to virtually any impaired person.

The court of appeals' decision directs that millions of persons with diabetes requiring insulin for control and visual deficiencies are, as a matter of law, not qualified to hold positions that involve any amount of driving.[22] It, in effect, discourages employers from following the requirements of the Rehabilitation Act and the Americans with Disabilities Act to determine if disabled persons are qualified for such positions. The decision counsels employers to do exactly that which the Rehabilitation Act sought to eradicate, rely on disability status, not individual abilities, in employment decisions.

The court of appeals' denial to millions of disabled Americans of the Rehabilitation Act's intended prohibition of discrimination in contradiction to the Act requires review.

---

[22] Diabetes alone affects an estimated 13,000,000 Americans. Dep't of Health and Human Serv., Diabetes in the United States: A Strategy for Prevention (1993) at 3. Over 300,000 Americans are insulin dependent. Ingrid Libman et al., *How Many People in the U.S. Have IDDM?*, 16 Diabetes 841 (1993). Many others also use insulin to control their diabetes. With the City of Dallas, the Fifth Circuit's ruling bars employees with insulin controlled diabetes from 4,000 positions in 138 different job categories.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH SUPREME COURT AND OTHER COURTS OF APPEALS' PRECEDENT.

A. Handicapped Status.

Primary elements of proof in a Section 504 Rehabilitation Act case are whether plaintiffs are handicapped as defined in the Act and whether they are "otherwise qualified" with or without reasonable accommodations.[23]

The Rehabilitation Act defines a handicapped individual as one who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;
>
> (ii) has a record of such impairment; or
>
> (iii) is regarded as having such an impairment.[24]

Contrary to this definition the Fifth Circuit held that diabetes requiring insulin for control and uncorrectable vision are not handicaps per se and that the City did not regard Maddox and the vision subclass as having an impairment that substantially limited any major life activity.

This holding conflicts with this Court's instructions in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987). Arline's tuberculosis was found to be a handicap because:

> This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impair-

---

[23] *E.g., School Bd. of Nassau County v. Arline*, 480 U.S. 273, (1987); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

[24] 29 U.S.C. § 706(8)(b).

> ment" within the meaning of 29 U.S.C. Section 706 (7)(b)(ii) and is therefore a handicapped individual.

This Court further explained, in *Arline*, that a plaintiff was handicapped even if the impairment did not, in fact, limit that person's functioning, but such impairment was perceived or treated as substantially debilitating. The Court cited Congress's expansion in 1974 of the definition of handicapped individual to include those persons with a record of or who are regarded as having an impairment but who may not be actually incapacitated.[25] Finally, the Court explained that the definition of handicap is broad under the Rehabilitation Act. *Arline* at 285.

The diabetes and visual problems of Plaintiffs and class members are serious. These impairments are permanent. Plaintiffs have had these conditions for decades. They have continually sought and received medical treatment and they have even been hospitalized for these conditions. According to *Arline*, their impairments are handicaps. The City, through AD3-3 has also defined plaintiffs as handicapped and barred them from thousands of primary driving positions thus treating them as if they were handicapped.

---

[25] Congress expanded the definition of handicapped to clarify that it intended to include those persons who are discriminated against on the basis of handicap whether or not they are in fact handicapped:

> This subsection includes within the protection of sections 503 and 504 those persons, who do not in fact have the condition they are perceived as having, as well as those persons whose mental or physical conditions do not substantially limit their life activities and who are not technically within [the first clause] in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. Rep. No. 1297, *supra*, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90.

The Fifth Circuit's holding that Plaintiff's impairments are not handicaps also conflicts with the findings in all other courts of appeals addressing the issue that insulin dependent diabetes is or has been agreed to be a handicap under the Rehabilitation Act.[26] Similarly, the courts have repeatedly found that visual impairments short of legal blindness (20/200 Snellen) are handicaps.[27]

The Fifth Circuit's opinion also admittedly conflicts with federal regulations applying statutes prohibiting employment discrimination against the disabled.[28] The Fifth Circuit specifically recognized that EEOC regulations provide that insulin dependent diabetes is a handicap, but failed to follow the cited regulation. *Chandler*, 2 F.3d at 1391.

---

[26] *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993); *Wood v. Omaha School District*, 985 F.2d 437 (8th Cir. 1993); *Serrapica v. City of New York*, 708 F. Supp. 64 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2nd Cir. 1989); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989); *Bentivegna v. Department of Labor*, 694 F.2d 619 (9th Cir. 1982). See also, *Brown v. County of Genesee*, 37 F.E.P. 1595 (D.C. Mich. 1985); *Miller v. Sioux Gateway Fire Dep't*, 497 N.W.2d 838 (Iowa, 1993); *Commonwealth Dep't of Transp. v. Tinley*, 564 A.2d 286 (Pa. Commw. Ct. 1989), *All. den'd*, 575 A.2d 570 (Pa. 1990); *Jackson v. Maine*, 544 A.2d 291 (Me. 1988), *cert. den'd*, 491 U.S. 904 (1989).

[27] *Norris v. St. Joseph Hospital*, 1993 U.S. App. LEXIS 11991 (4th Cir. 1993) (glaucoma); *O.F.C.C.P. v. Norfolk & Western R.R. Co.*, Case No. 90-OFC-1 (June 26, 1991) (vision in one eye only); *Greenwood v. State Police Training Ctr.*, 606 A.2d 336 (N.J. 1992) (blurred vision); *Colorado Civil Rights Comm'n v. North Wash. Fire Prot. Div.*, 772 P.2d 70 (Colo. 1988) (*en banc*) (correctable vision); *Frito-Lay v. Wisconsin Labor & Ind. Rev. Comm'n*, 290 N.W.2d 551 (Wis. 1980), *aff'd*, 303 N.W.2d 668 (Wis. 1980); *Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Oppor.*, 405 A.2d 618 (Conn. 1978).

[28] According to this Court, and even the Fifth Circuit, regulations promulgated to accompany the Rehabilitation Act "accurately express Congressional intent." *Arline*, 480 U.S. at 279-80; *Chiari v. City of League City*, 920 F.2d 311 n.6 (5th Cir. 1991); *Prewitt v. United States Postal Service*, 622 F.2d 292, 308-9 (5th Cir. 1981).

The federal regulations repeatedly provide that the third part of the definition of handicapped or disabled, "is regarded as having such an impairment," means:

> (1) has a physical or mental impairment that does not substantially limit major life activities, but is treated by an employer as constituting such a limitation;
>
> (2) has a physical impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment;
>
> (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.[29]

Federal regulation defines working or employment as a major life activity:

> . . . for purposes of this part, a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a handicap.[30]

Finally, regulations have directed that in order to determine if a physical impairment is a handicap it must be looked at without mitigating medicine or devices. The EEOC specifically explained that:

> A diabetic, who, without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.[31]

The City has treated and regarded its diabetic and visually impaired employees as handicapped by barring

---

[29] 45 C.F.R. § 84.3 (1992); 40 C.F.R. § 7.25 (1993); 29 C.F.R. § 32.3 (1993); 28 C.F.R. § 42.50(k) (1993). App. 100a-101a.

[30] 41 C.F.R. § 60-741.2 (1993). App. 101a-102a.

[31] 29 C.F.R. § 1630.2(j), App. 104a.

them from thousands of jobs because of their impairments under AD3-3. According to federal regulations these employees are handicapped.

The court of appeals has applied an unprecedentedly narrow view of the definition of handicap to exclude physically impaired persons from intended coverage under the Rehabilitation Act. Without reversal, Plaintiffs, class members, and millions of persons with insulin dependent diabetes and visual deficiencies under Fifth Circuit jurisdiction will not be allowed to proceed under the statutes against handicap discrimination regardless of their abilities because they do not meet the definition of "handicapped." The Fifth Circuit's holding also means that these persons will be denied opportunity to prove their individual capabilities for employment in Texas, Louisiana, and Mississippi while no such limitation would be applied to them anywhere else.

B. Otherwise Qualified.

The Fifth Circuit holding that as a matter of law Plaintiffs and all persons with insulin controlled diabetes and uncorrectable visual impairments as defined in Department of Transportation regulations for interstate drivers are not "otherwise qualified" because they present safety risks conflicts with Supreme Court and lower court precedent and the intent of the Rehabilitation Act.

In *School Bd. of Nassau County v. Arline*, 480 U.S. 273, the Court addressed the claim that the plaintiff was not otherwise qualified because of the alleged threat of her impairment, tuberculosis, to the safety of others. It provided that the trial courts must, in most cases, conduct an individualized inquiry including review of medical evidence in order for "Section 504 to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear." [32]

[32] The Court cited Congressional action to expand the definition of handicapped individual and Congressional concern to protect

The Court explained that although some persons with a particular impairment may pose a serious health threat to others, exclusion from coverage of all persons with actual or perceived handicaps is not justified. The Court continued that:

> Such exclusion would mean that those accused of being [safety risks] would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[33]

Other courts have also required individualized inquiry of the issue of otherwise qualified. They have held that where a defense of safety risk is raised, the defendant must show reasonable probability of substantial harm based on review of the employee's work history, medical

---

"the handicapped against discrimination stemming not only from prejudice, but from archaic attitudes and laws, and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.' S. Rep. No. 1297, p. 50 (1974)." *Arline*, 480 U.S. 273 at 279.

The Court's concern that stereotypes and outmoded perceptions not be automatically accepted as bases for determinations that disabled Americans are not qualified by reason of their disabilities was echoed in subsequent legislative history concerning the Americans with Disabilities Act. H. Rep. No. 485(III), 101st Cong., 2nd Sess., *reprinted in* 1990 U.S.C.C.A.N. at 453 warns that "identified common barriers that frequently result in employers excluding disabled persons, . . . includ[ing] concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers" should be carefully scrutinized. Congress also stated its agreement with the required individual consideration provided by this Court in *Arline* in its explicit statement that it intended to codify the direct threat standard used in *Arline*. H. Rep. No. 485(III), *reprinted in* 1990 U.S.C.C.A.N. at 455.

[33] *Arline*, 480 U.S. 273 at 285.

history, and individual assessment of the probability and severity of potential injury. Where safety concerns have been raised the individualized inquiry requirement has been applied with regard to insulin dependent diabetes,[34] epilepsy,[35] hearing impairments,[36] chronic hepatitis,[37] AIDS,[38] back abnormalities,[39] Parkinson's disease,[40] and morbid obesity.[41]

Commentators have also explained that the allegation of risk to self or others cannot be accepted automatically:

> [T]o find that a handicapped person is not qualified based on fear of harm to others there must be a substantive record of evidence supporting the proposition that performance by the handicapped person would constitute a threat to the health or safety of others.[42]

The Fifth Circuit's determination that as a matter of law Plaintiffs and class members are not otherwise qualified because of diabetes and visual impairments is in conflict with the requirements of *Arline*, the above cited

---

[34] *Bentivegna v. Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982).

[35] *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985).

[36] *Strathie v. Dep't of Transp.*, 716 F.2d 227 (3rd Cir. 1983).

[37] *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990).

[38] *Chalk v. U.S. Dist. Court, Cent. Dist. of California*, 840 F.2d 701 (9th Cir. 1988).

[39] *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 484 (D.C. Haw. 1980); *Dep't of Labor v. Texas Instruments*, 80 OFC-28, 47 F.E.P. 18 (June 7, 1988).

[40] *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991).

[41] *Cook v. Rhode Island*, 10 F.2d 17 (1st Cir. 1993).

[42] Bonnie P. Tucker, *Section 504 of the Rehabilitation Act after Ten Years of Enforcement: The Past and the Future*, 4 U. Ill. L. Rev. 845, 901-2 (1989). *See also*, Mark L. Bayler, *Dulling a Needle: Analyzing Federal Employment Restrictions on People with Insulin Dependent Diabetes*, 67 Ind. L.J. 1067, 1086-89 (1992).

cases, and legislative intent that each handicapped person's abilities, not his status, determine if he is employed and provided the benefits of such employment.

The Fifth Circuit's reliance on Department of Transportation (DOT) regulations for interstate truck drivers to support its wholesale exclusion of thousands of individuals from city positions is unsupported by the actual regulations and conflicts with Supreme Court precedent.

The DOT regulations have no application to city drivers or to vehicles weighing 10,000 pounds or less,[43] the type of driving performed and vehicles driven by Plaintiffs. Thus the DOT regulations were never applicable to the Plaintiffs. Moreover, the DOT regulations include waiver provisions for insulin dependent diabetes and visual deficiencies,[44] again making the Fifth Circuit's reliance on them to deny Plaintiffs, class members, and by extension all persons with insulin dependent diabetes and visual deficiencies in driving positions unfounded.

The Court in *Johnson v. Mayor of Baltimore,* 472 U.S. 353 (1985), directed that wholesale reliance on a federal statute to justify local government regulations and legitimate discrimination per the local regulations is improper. In *Johnson,* the Court reversed a Fourth Circuit holding that a federal statute generally requiring federal fire fighters to retire at age fifty-five established, as a matter of law, that age fifty-five is a bona fide occupational qualication (BFOQ) for non-federal fire fighters within the meaning of the Age Discrimination in Employment Act (ADEA). The Court held that non-federal employers should not be allowed to circumvent the individual fact finding requirements as to ability to perform the job by mere citation to an unrelated statutory provision. Similarly, in *Western Airlines, Inc. v. Criswell,* 472 U.S.

---

[43] 49 C.F.R. §§ 390.3 and 390.5, App. 105a.

[44] 58 Fed. Reg. 40690 (July 29, 1993); 57 Fed. Reg. 10295 (March 25, 1992).

400 (1985), the Court held that age sixty required retirement of air line pilots does not establish that age is also a BFOQ for any other position including flight engineer under the ADEA. The Court emphasized that the BFOQ provisions are to be narrowly applied and that any discriminatory provisions must be proven by the employer to be reasonably necessary for safety.

The Supreme Court has thus instructed that a non-federal employer such as the City of Dallas cannot circumvent the Rehabilitation Act requirement of individualized determination of ability to perform the job through reliance on a federal regulation. This is particularly so when the City has not even determined or claimed that its physical restrictions are BFOQs.[45]

C. Class Certification.

The court of appeal's reversal of the district court's class certification and class injunctive relief again conflicts with the requirements under the Rehabilitation Act and precedent that qualifications of disabled persons be determined on an individual basis, in most cases, not according to status.[46]

The district court held that the City, "the party opposing the class," had with respect to AD3-3 "acted or refused to act on grounds generally applicable" to the two subclasses, thereby making injunctive relief only appropriate to prevent the discriminatory application of AD3-3 under Rule 23(b)(2). The trial court required that the City stop discriminating against its employees on the basis of their handicaps without proof that each individual excluded from "primary driving" positions was a safety risk. The Fifth Circuit held that class certifi-

---

[45] Tr. 21, pp. 62-63; Findings and Conclusions, App. 31a.

[46] See I. and II.B., *supra*.

cation and injunctive relief were improper because the Rehabilitation Act required individual consideration.[47] The court of appeals' reversal is puzzling as individual consideration is exactly what the district court ordered the City to provide to persons it defined and treated as handicapped under AD3-3.

The court of appeals' reversal again affects millions of Americans. It effectively bars the use of class actions in handicapped cases, at least all cases where qualifications are at issue.

D. Due Process.

Plaintiff Chandler appealed his demotion. He was not allowed to present any evidence that his demotion was due to his claims of handicapped discrimination and filing of this lawsuit. The district court specifically held:

> The City violated Chandler's *due process* rights by denying him any opportunity to present evidence—during Chandler's appeal from the demotion—that he had been demoted because of his opposition to AD3-3's discrimination against handicapped employees. This denial of Chandler's due process rights was distinct from the City's actual discrimination against Chandler because of his handicap.[48]

Contrary to such holding, the Fifth Circuit summarily reversed holding that the hearing was constitutionally adequate.

The Fifth Circuit's reversal on this issue conflicts with the well established precedent that due process requires that Plaintiff Chandler, who, through his demotion, lost

---

[47] The Fifth Circuit's recognition that the Rehabilitation Act requires individual assessment on the issue of qualification is correct. It also reveals the court of appeals' error in its conflicting holding that persons with insulin controlled diabetes and visual deficiencies are not otherwise qualified as a matter of law.

[48] Findings and Conclusions, App. 66a.

a protected property interest, be allowed a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985); *Thurston v. Dekle,* 531 F.2d 1264 (5th Cir. 1985).

III. IT IS NECESSARY THAT THIS COURT EXERCISE ITS SUPERVISORY POWERS.

The court of appeals violated the clearly erroneous rule by summarily reversing the district court's detailed findings of fact which the City did not question on appeal.

Federal Rule of Civil Procedure 52(a) provides:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.

The clearly erroneous standard precludes a court of appeals from reversing a district court's decision if that court's account of the evidence is plausible in light of the record viewed in its entirety, even though the court of appeals is convinced that it would have weighed the evidence differently had it been sitting as the trier of fact. *E.g., Anderson v. City of Bessemer City,* 470 U.S. 564 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). *See, Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 400 (1990).

The *Pullman Standard* case is remarkably similar to the present case. In *Pullman Standard,* as in this case, the Fifth Circuit reversed and rendered a district court decision in a discrimination case on its own findings regarding discrimination. This Court strictly instructed that findings of fact including the ultimate fact of intentional discrimination are governed by the clearly erroneous rule and that the Fifth Circuit could not reverse and render on its own determination of the facts.

Even the Fifth Circuit, in its first (1992) decision in this case, recognized that it was bound by the clearly erroneous standard in reviewing the district court's findings of fact. It held that the trial court had "heard all of the evidence, allowed the parties to present their cases in full, and sought to resolve the case in a responsible manner." *Chandler,* 958 F.2d at 90. But, the Fifth Circuit instructed that it needed detailed findings of fact:

> [T]he portion of the judgment rendering the City liable on the Plaintiffs' Rehabilitation Act claims alone required multiple findings of fact: whether the Plaintiffs were "handicapped" within the meaning of the Rehabilitation Act; whether the Plaintiffs were "otherwise qualified" for their jobs at DWU . . . . Without findings on these and other issues of fact, we cannot obtain a complete understanding of the issues on appeal and shoulder our responsibility to review for clear error.

Nevertheless, in direct conflict with the district court's subsequent unchallenged findings, the Fifth Circuit held in its second opinion that Plaintiffs were not handicapped and not otherwise qualified. The Fifth Circuit also summarily reversed the district court's finding regarding class certification, its findings of denial of freedom of speech, due process, and equal protection. Finally, the court of appeals reversed, without any explanation or reference, the district court's detailed findings that the City retaliated against Plaintiffs in violation of the Rehabilitation Act by threatening them with discharge and demoting Chandler.

The court of appeals' actions conflict with Rule 52(a), Supreme Court precedent, and even the law of this case. It was not within the province of the court of appeals to substitute its contrary findings of fact for those of the trial court. It was also improper for the court of appeals to reverse and render based on its own findings. Only through this Court's exercise of its supervisory powers can the court of appeals' violation of the clearly erroneous rule be corrected.

CONCLUSION

A writ of certiorari should be issued and the judgment and decision of the court of appeals should be reversed.

Respectfully submitted,

GENICE A.G. RABE
Counsel of Record
L.N.D. WELLS, JR.
Suite 1202
600 E. Las Colinas Boulevard
Irving, Texas 75039-5606
(214) 556-2999
Counsel for Petitioners

January 31, 1994